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No. 123

In the Supreme Court of the United States

OCTOBER TERM, 1942

BERNARD H. DANIEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (No. 12120, R. 19–22) [1] is reported at 127 F. (2d) 1.

[1] The record before this Court consists of the record on a prior appeal (circuit court of appeals case No. 11846) which resulted in a reversal and remand on suggestion of error by the Government (No. 12120, R. 2), and the record of the proceedings on retrial (No. 12120). At the second trial the record on the first appeal was by stipulation offered in evidence, and the case was submitted on that record together with some additional evidence (*id.* 3, 9–10). On the second appeal the court below permitted petitioner to use the record on the former appeal without including it in the record of the retrial (*id.* 16–17). In accordance with the method of citation used by petitioner (Pet. 2) the letter "R." is used to designate the record in No. 11846. References to the record on the second appeal (No. 12120) are specifically noted.

JURISDICTION

The judgment of the circuit court of appeals was entered April 15, 1942 (No. 12120, R. 22), and a petition for rehearing (*id.* 23–25) was denied May 7, 1942 (*id.* 27). The petition for a writ of certiorari was filed June 6, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether false statements made by an accused at the time of his arrest to explain suspicious circumstances are admissible in evidence against him to show guilty knowledge.

2. Whether petitioner's conviction was supported by substantial evidence.

STATUTE INVOLVED

Section 3 (a) of the Liquor Enforcement Act of 1936 (Act of June 25, 1936, c. 815, 49 Stat. 1928, 27 U. S. C. 223 (a)) provides as follows:

> Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in

so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT

On May 8, 1940, an information was filed in the District Court for the Western District of Missouri charging that petitioner knowingly and wilfully attempted to transport intoxicating liquor containing more than 4 per cent alcohol by volume from Missouri into Kansas, in which state the sale of such liquor is prohibited, in violation of the Liquor Enforcement Act of 1936 (*supra,* pp. 2–3) (R. 1–2). The case was tried by the court without a jury (Pet. 2). Petitioner was found guilty, given a six-month jail term, and ordered to pay a $500 fine (R. 4–5).

On appeal the Government suggested error,[2] and the court below accordingly reversed the convic-

[2] In the interim pending the appeal the court below held in *Arnold* v. *United States*, 115 F. (2d) 523, and *Gregg* v. *United States*, 116 F. (2d) 609, that in view of the variance between the provisions of the Kansas liquor legislation which define as intoxicating and prohibit the sale of liquor containing more than 3.2 per cent alcohol by weight (G. S. Kan. (Corrick 1939 Supp), c. 21, art. 21, secs. 2109, 2109a; G. S. Kan. (Corrick 1935), c. 21, art. 21, sec. 2101), and the prohi-

tion and remanded the cause for further proceedings (No. 12120, R. 2–3). At the second trial before the court without a jury (*id.* 4) the record of the first trial was by stipulation offered in evidence, and the case was submitted on that record (*id.* 3, 9–10). The only additional evidence presented was the testimony of a chemist that liquids containing 3.2 per cent alcohol by weight are equivalent in alcoholic content to liquids containing 4 per cent alcohol by volume (*id.* 10). Petitioner was again found guilty (*id.* 4) and received the same sentence as previously imposed (*id.* 5–6). On the second appeal the conviction was affirmed (*id.* 22).

The evidence adduced by the Government may be summarized as follows:

On November 23, 1939, petitioner was arrested for reckless driving by an officer of the Missouri Highway Patrol at a point a few miles south

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bition of the federal Liquor Enforcement Act of 1936 against transportation of intoxicating liquor into any state in which sales of intoxicating liquor containing more than 4 per cent alcohol by volume are prohibited, and in the absence of proof as to the equivalence of the two standards of measurement, it could not say that the federal statute applied to Kansas. It was because of these decisions and the absence of such proof at the first trial of petitioner that the Government suggested error (No. 12120, R. 2–3, 15). In its later decisions in *Dolloff* v. *United States*, 121 F. (2d) 157, certiorari denied, 314 U. S. 626, and *Flippin* v. *United States*, 121 F. (2d) 742, certiorari denied, 314 U. S. 677, the court below held upon the basis of evidence and recognized scientific authorities that the two standards of measurement are substantially identical and, accordingly, that the federal act applies to Kansas.

of Lees Summit, Missouri. At the time of the arrest petitioner was traveling south on U. S. Highway 71 by-pass, which borders Kansas City, Missouri. (R. 9–10.) Texas license plates were on the car, and petitioner showed the officer a Texas driver's license issued November 2, 1939, and bearing a Houston, Texas, address (R. 10, 33). Fifteen cases of liquor were in the rear of the car (R. 10–11, 15). Petitioner was taken to patrol headquarters in Lees Summit and, on being asked for further identification, exhibited a Kansas driver's license and a Kansas automobile registration for his car, both bearing an address in Emporia, Kansas (R. 10, 32, 33). He also produced a special tax stamp issued by the collector for the first district of Texas to petitioner as a retail liquor dealer for a period commencing Nov, ember 1, 1939; the stamp carried a Houston, Texas, address (R. 10, 29). Petitioner had in his possession an invoice for the liquor, disclosing that it had been purchased from the Country Club Distributing Company in Alton, Illinois, and giving petitioner's name as purchaser and Houston as his address (R. 11, 29). Petitioner explained to the state officers that he had purchased the liquor in Alton and was taking it to Houston, where he and his sister-in-law were to consume it, and that a week previously he had carried from Alton to Houston on a similar load of liquor which he and his sister-in-law had consumed. Petitioner, the car, and the liquor were thereupon turned over to officers of the United States Alco-

hol Tax Unit. (R. 12.) Kansas license plates were found in the car (R. 21–22). Petitioner told one of the federal officers that he and his sister-in-law, Mrs. Frankie Reece, had "chipped in together and brought this liquor and was consuming it" (R. 13), and that "they had consumed twelve cases in about a week's time, and that he was going back with fifteen more" (R. 15). Asked why he had bought a special retailer's tax stamp in Texas if he was going to consume the liquor, petitioner replied that he "just wanted one" (R. 14). When another of the federal officers expressed disbelief in petitioner's story and suggested that it would be better for him to tell the truth, petitioner replied that "it probably would be better to tell the truth, and that a lie would just get him into trouble, but he had to have some story, and that one story was about as good as another" (R. 15).

Besides petitioner's possession of a Kansas driver's license and automobile registration, both listing an Emporia, Kansas, address, there was other undisputed evidence that petitioner was living there at the time of his arrest. The chief clerk to the superintendent of the Santa Fe Railroad Company at Emporia testified that petitioner was employed by that company and had given his Emporia address as the residence address where he was subject to call up to July 25, 1940, when he substituted a North Kansas City address, and

that he had never given Houston, Texas, as his address (R. 16–17). The sheriff at Emporia testified that he had known petitioner for approximately two years prior to the first trial; that during this period petitioner lived in Emporia; that he had collected personal taxes from petitioner in November 1939; and that petitioner, his wife, and children continued to reside in Emporia for a couple of months following his arrest. The cashier of an Emporia bank testified that petitioner had negotiated a loan on November 17, 1939, a week prior to his arrest, and had given a mortgage on certain livestock, hogs, and cattle located on a farm near Emporia. (R. 17.) A neighbor testified that petitioner lived across the street from him in Emporia for several years prior to February 1940. There was similar testimony by petitioner's landlady. (R. 18.)

Mrs. Frankie Reece, petitioner's sister-in-law, was called as a witness for the Government and testified that she lived in Houston, Texas, and that petitioner and his wife visited her once or twice in the fall of 1939 for a few days; that petitioner told her at that time that he thought the liquor business in Houston was good and that he might try to locate there; that petitioner bought a retail liquor dealer's tax stamp and was to stay at her house if he opened up a liquor business; that petitioner never brought any liquor to her house; that

she never contributed toward the purchase of any liquor; and that no liquor business was ever conducted at her home (R. 19–20).

Petitioner did not testify and only one witness was called in his behalf (R. 21).[3]

ARGUMENT

1. Petitioner complains (Pet. 4, 12, 16–23) that the testimony of the arresting officers concerning his statements that a week prior to his arrest he had purchased another load of approximately a dozen cases of whiskey in Alton, Illinois, and taken it to Houston, Texas, where he and his sister-in-law had consumed it, was incompetent and prejudicial and should have been excluded. We think the argument is based on a misconception of the applicable rule of evidence.[4] The statements com-

[3] The testimony of this witness is omitted from the bill of exceptions as "not material to appeal" (R. 21).

[4] The familiar rule that proof of the commission of another crime by the accused is inadmissible, and the equally familiar exception to the rule which permits evidence of another offense of a similar nature to show intent, are entirely irrelevant. The Government did not attempt to show or even suggest that petitioner had previously committed another similar offense. If the statements complained of were true, it is clear that no previous crime was committed, since it is not a crime to transport liquor to Texas. And if the statements were false, no inference one way or another could have arisen as to any previous crime. Hence the cases cited and extensively quoted in petitioner's brief (Pet. 18–20)

plained of were self-serving declarations of petitioner designed to give an innocent explanation of the presence of the liquor in his car. It is well established that self-serving statements made by a defendant out of court, explaining suspicious circumstances, may be proved against him and their falsity then be shown. The fact of their falsity admits them as indicating guilty knowledge and an attempt to explain away incriminating circumstances by falsehoods. *Wilson* v. *United States*, 162 U. S. 613, 620–621; *Halbert* v. *United States*, 290 Fed. 765, 768 (C. C. A. 6).[5] The falsity of

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which discuss the rule and the exception referred to are not in point.

Gart v. *United States*, 294 Fed. 66 (C. C. A. 8), cited by petitioner for the proposition that proof of a "suspicious circumstance" is inadmissible (Pet. 21–23), is equally inapposite. The evidence in question in that case did not consist of statements made by the accused, but of outside proof of an extraneous act which the court characterized as "merely proof of a suspicious circumstance" in no way connected with the offense charged (p. 67).

[5] See also *People* v. *Martin*, 16 Cal. App. (2d) 515, 517 (1936); *Mora* v. *People*, 19 Colo. 255, 260–262 (1893); *Roberts* v. *State*, 25 Del. 385, 389 (Sup. Ct. 1911); *Smith* v. *State*, 29 Fla. 408, 422–423 (1892); *State* v. *Hayes*, 162 La. 310, 314 (1926); *People* v. *Minchella*, 218 Mich. 517, 519–520 (1922); *State* v. *Robinson*, 117 Mo. 649, 664 (1893); *State* v. *Bishop*, 98 N. C. 773, 775 (1887); *State* v. *Jennings*, 48 Ore. 483, 492–493 (1906); *Commonwealth* v. *Dumber*, 69 Pa. Super. 196, 199–200 (1918). And see 4 Wigmore, *Evidence* (3rd ed. 1940), secs. 1048, 1052, 1060a.

petitioner's statements was clear both from their own intrinsic improbability and from the testimony of his sister-in-law (*supra,* pp. 7–8). Consequently, the evidence of the statements would have been admissible as giving rise to a legitimate inference of guilt even if the case had been tried before a jury.

2. Petitioner contends that all the competent evidence was as consistent with innocence as with guilt and that the trial court therefore should have sustained his motion for acquittal (Pet. 4, 12–13, 23–26, 27–29). But, as the court below held (No. 12120, R. 19–22), even apart from the evidence of petitioner's statements to the officers regarding the transportation of another load of liquor to Houston, Texas, a week previously, there was ample proof to sustain the conviction. The evidence, summarized in the Statement (*supra*, pp. 4–8), and the inferences reasonably deducible from it indicate that petitioner, after having purchased the liquor at Alton, Illinois, had driven west across the state of Missouri almost to the Kansas line and then turned south (see No. 12120, R. 19–20). When he was arrested a few miles south of Lees Summit, Missouri, he was traveling a route which, if he made appropriate turns, would take him to Emporia, Kansas (see R. 27–28), where he lived with

his family and was employed.[6] Although his car bore Texas license plates and he had a Texas driver's license, he also had a Kansas driver's license and Kansas plates were found inside his car. While he had visited his sister-in-law in Houston on prior occasions and was possibly planning to move there, he did not live there at the time of his arrest. His procurement of a Texas driver's license and Texas license plates and his purchase of a retail liquor dealer's tax stamp on one of his visits to Houston could very reasonably have been regarded as precautionary measures designed to establish his innocence in the event he should subsequently be apprehended attempting to import liquor into Kansas.[7] This evidence in itself was sufficient to justify the conviction. And when considered together with petitoner's explanation to the officers that he was taking the liquor to

[6] While the route petitioner was following would have taken him to Texas if he kept traveling south (see R. 23), this fact loses significance when it is observed, as the court below pointed out (No. 12120, R. 21–22), that "Lees Summit, Missouri, is a long way from any reasonably direct route from Alton, Illinois, to Houston, Texas. One who was transporting liquor from Alton to Houston would hardly go by way of Lees Summit."

[7] Both the district court and the circuit court of appeals branded these measures as "camouflage" (R. 24; No. 12120, R. 22). Cf. *Gregg* v. *United States*, 113 F. (2d) 687, 689, 690 (C. C. A. 8), where a similar scheme was adopted.

Houston for personal consumption by himself and his sister-in-law, which the court below characterized as "absurd" (No. 12120, R. 22), and his further statement that he "had to have some story, and that one story was about as good as another" (R. 15), the evidence of his guilt was virtually conclusive.[8]

CONCLUSION

The case was correctly decided below, and there is neither conflict of decisions nor any question of

[8] Petitioner's contention (Pet. 4, 12, 26–27) that his motion for acquittal should have been sustained because the Government failed to prove that the liquor he was transporting was not accompanied by a permit, as charged in the information, was not specifically raised at the trial or in the assignment of errors (see No. 12120, R. 8–9) and was not discussed in the opinion of the court below. We assume, however, that the point was saved by the motion for acquittal and the general assignment that the evidence was insufficient, but we think that the contention is without merit. It was a legitimate inference from the Government's uncontradicted evidence that petitioner was attempting to transport intoxicating liquor into Kansas without a permit. The inference is especially clear from petitioner's absurd statement to the officers that he was taking the liquor to Texas for personal consumption; obviously he would not have offered such a tenuous explanation if he in fact had a permit. It is well settled that where there is substantial evidence of guilt, viewing the evidence and all inferences reasonably deducible therefrom most favorably to the Government, the denial of a motion for acquittal or a directed verdict must be sustained. *Glasser* v. *United States*, 315 U. S. 60, 80; *France* v. *United States*, 164 U. S. 676, 681; *Walker* v. *United States*, 93 F. (2d) 383, 392 (C. C. A. 8),

general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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certiorari denied, 303 U. S. 644; *Marx* v. *United States*, 86 F. (2d) 245, 250 (C. C. A. 8); *Galatas* v. *United States*, 80 F. (2d) 15, 23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Smith* v. *United States*, 62 F. (2d) 1061 (App. D. C.); *Zottarelli* v. *United States*, 20 F. (2d) 795, 796 (C. C. A. 6), certiorari denied, 275 U. S. 571; *Duff* v. *United States*, 185 Fed. 101, 102 (C. C. A. 4).

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